



# Draft Mental Incapacity Bill

Presented to Parliament by  
the Secretary of State  
for Constitutional Affairs – June 2003

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VOLUME 1



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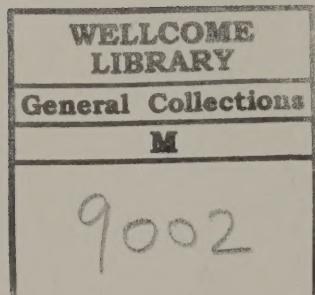


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(2) It does not matter whether the requirement of guardianship is permanent or temporary.

## 2 Inability to make decisions

(1) For the purposes of section 1, a person is unable to make a decision for himself if—

- he is unable to understand the information relevant to the decision;
- he is unable to retain the information relevant to the decision;
- he is unable to use the information relevant to the decision in part of the process of taking the decision; or
- he is unable to communicate the decision (whether by talking using sign language or any other means).



(a) in circumstances where it is reasonably believed that a person lacks capacity to make a decision in relation to his affairs as directed by the person A (5)  
(b) in circumstances where it is reasonably believed that a person lacks capacity to make a decision in relation to his affairs as directed by the person A (6)  
(c) in the case of a person who has been lawfully granted power of attorney over the affairs of another person A (7)  
to make a decision in relation to his affairs as directed by the person A (8)  
concerned.

# B I L L

TO

Make new provision relating to persons who lack capacity; to establish a superior court of record called the Court of Protection in place of the office of the Supreme Court called by that name; and for connected purposes.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

## PART 1

### PERSONS WHO LACK CAPACITY

#### Preliminary

##### 1 Persons who lack capacity

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of or a disturbance in the functioning of the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.

##### 2 Inability to make decisions

- (1) For the purposes of section 1, a person is unable to make a decision for himself if—
  - (a) he is unable to understand the information relevant to the decision,
  - (b) he is unable to retain the information relevant to the decision,
  - (c) he is unable to use the information relevant to the decision as part of the process of making the decision, or
  - (d) he is unable to communicate the decision (whether by talking, using sign language or any other means).

- (2) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success.
- (4) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision. 5
- (5) The information relevant to a decision includes information about the reasonably foreseeable consequences of –
  - (a) deciding one way or another, or
  - (b) failing to make the decision. 10

### 3 Presumption against lack of capacity

- (1) For the purposes of this Act, a person must be assumed to have capacity unless it is established that he lacks capacity.
- (2) Any question in any proceedings, under this or any other Act, whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities. 15

### 4 Best interests

- (1) Where under this Act any act is done for, or any decision is made on behalf of, a person who lacks capacity, the act must be done or the decision made in the person's best interests. 20
- (2) In deciding for the purposes of this Act what is in a person's best interests, regard must be had to –
  - (a) whether he is likely to have capacity in relation to the matter in question in the future;
  - (b) the need to permit and encourage him to participate, or to improve his ability to participate, as fully as possible in any act done for and any decision affecting him;
  - (c) so far as ascertainable –
    - (i) his past and present wishes and feelings, and
    - (ii) the factors which he would consider if he were able to do so;
  - (d) if it is practicable and appropriate to consult them, the views of –
    - (i) any person named by him as someone to be consulted on the matter in question or on matters of that kind,
    - (ii) any person engaged in caring for him or interested in his welfare,
    - (iii) any donee of a lasting power of attorney granted by him, and
    - (iv) any deputy appointed for him by the court,

as to his past and present wishes and feelings and the factors he would consider if he were able to do so;

- (e) whether the purpose for which any act or decision is needed can be as effectively achieved in a way less restrictive of his freedom of action. 35
- (3) The duty in subsection (1) also applies in relation to the exercise of any powers which under this Act are exercisable – 40

- (a) under a lasting power of attorney, or
- (b) in circumstances where it is reasonably believed that a person lacks capacity.

(4) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with subsection (1) if the person reasonably believes that what he does or decides is in the best interests of the person concerned.

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## 5 Adults and young people

- (1) The powers conferred under this Act in relation to a person who lacks capacity (or where it is reasonably believed a person lacks capacity) are not exercisable in relation to a person who is under the age of 16.
- (2) Subsection (1) is subject to section 18(3) (powers of court in relation to child's property and affairs).

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### *The general authority and restrictions on it*

## 6 The general authority

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- (1) It is lawful for any person to do an act when providing any form of care for another person ("P") if –
  - (a) P lacks, or the person reasonably believes that P lacks, capacity in relation to the matter in question, and
  - (b) in all the circumstances it is reasonable for the person to do the act.
- (2) If the act involves expenditure, it is lawful –
  - (a) to pledge P's credit for the purpose of the expenditure, and
  - (b) to apply money in P's possession for meeting the expenditure.
- (3) If the expenditure is borne for P by another person it is lawful for that person –
  - (a) to reimburse himself out of money in P's possession, or
  - (b) to be otherwise indemnified by P.
- (4) Subsections (1) to (3) do not affect any power under which (apart from those subsections) a person –
  - (a) has lawful control of P's money or other property, and
  - (b) has power to spend money for P's benefit.
- (5) In this Act "the general authority" means the authority conferred by this section.
- (6) The general authority is subject to the provisions of this Act and, in particular, to section 4 (best interests).

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## 7 Restrictions on the general authority

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- (1) The general authority does not authorise a person –
  - (a) to use, or threaten to use, force to secure the doing of an act which P resists, or
  - (b) to restrict P's liberty of movement whether or not P resists,

unless the person reasonably believes that it is necessary to do so to avert a substantial risk of significant harm to P.

(2) The general authority does not authorise a person to do an act which conflicts with a decision made, within the scope of his authority and in accordance with this Part, by –

(a) a donee of a lasting power of attorney granted by P, or

(b) a deputy appointed for P by the court.

(3) Nothing in subsection (2) stops a person –

(a) providing life-sustaining treatment, or

(b) doing any act reasonably believed to be necessary to prevent a serious deterioration in P's condition,

while a ruling as respects any relevant issue is sought from the court.

(4) In this Act “life-sustaining treatment” means treatment which in the view of a person providing health care for P is necessary to sustain life.

(5) The general authority is subject to sections 23 to 25 (advance decisions to refuse treatment).

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*Lasting powers of attorney*

## 8 Lasting powers of attorney

(1) A lasting power of attorney is a power of attorney under which the donor (“P”) confers on the donee (or donees) authority to make decisions about all or any of the following –

(a) P's personal welfare or specified matters concerning P's personal welfare, and

(b) P's property and affairs or specified matters concerning P's property and affairs,

and which includes authority to make such decisions in circumstances where P no longer has capacity.

(2) A lasting power of attorney is not created unless –

(a) section 9 is complied with,

(b) an instrument conferring authority of the kind mentioned in subsection (1) is executed and registered in accordance with Schedule 1, and

(c) at the time when the instrument is executed, P has reached 18 and has capacity to execute it.

(3) An instrument which –

(a) purports to create a lasting power of attorney, but

(b) does not comply with this section, section 9 and Schedule 1, confers no authority.

(4) The authority conferred by a lasting power of attorney is subject to –

(a) the provisions of this Part and, in particular, section 4 (best interests), and

(b) any conditions or restrictions specified in the instrument.

## 9 Appointment of donees

(1) A donee of a lasting power of attorney must be—  
(a) an individual who has reached 18, or  
(b) if the power relates only to P's property and affairs, either such an individual or a trust corporation.

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(2) An individual who is bankrupt may not be appointed as donee of a lasting power of attorney in relation to P's property and affairs.

(3) An instrument under which two or more persons are to act as donees of a lasting power of attorney may appoint them to act—

(a) jointly, or  
(b) jointly and severally.

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(4) An instrument—

(a) under which two or more persons are to act as donees of a lasting power of attorney, but  
(b) which does not specify whether they are to act jointly or jointly and severally,

is to be assumed to appoint them to act jointly.

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(5) Subsections (6) and (7) apply where an instrument appoints two or more persons to act as donees.

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(6) If they are to act jointly, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1 prevents a lasting power of attorney from being created.

(7) If they are to act jointly and severally, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1—

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(a) prevents the appointment taking effect in his case, but  
(b) does not prevent a lasting power of attorney from being created in the case of the other or others.

(8) An instrument used to create a lasting power of attorney—

(a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor, but  
(b) may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event given in any of paragraphs (a) to (c) of section 12(5) which has the effect of terminating the donee's appointment.

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## 10 Scope of lasting powers of attorney: personal welfare

(1) A lasting power of attorney does not authorise the donee (or, if more than one, any of them)—

(a) to use, or threaten to use, force to secure the doing of an act which P resists, or  
(b) to restrict P's liberty of movement whether or not P resists, unless the conditions in subsection (2) are met.

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(2) The conditions are that—

- (a) P lacks, or the donee reasonably believes that P lacks, capacity in relation to the matter in question, and
- (b) the donee reasonably believes that it is necessary to do the act to avert a substantial risk of significant harm to P.

(3) Subject to subsections (4) and (5), where a lasting power of attorney confers authority to make decisions about P's personal welfare, the authority extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P. 5

(4) The authority –

- (a) does not extend to giving or refusing consent to the carrying out or continuation of any treatment by a person providing health care for P, unless P lacks capacity to give or refuse that consent;
- (b) does not extend to refusing consent to the carrying out or continuation of life-sustaining treatment, unless the lasting power of attorney contains express provision to that effect;
- (c) is subject to sections 23 to 25 (advance decisions to refuse treatment). 10

(5) Subsection (3) is subject to any conditions or restrictions in the instrument. 15

## 11 Scope of lasting powers of attorney: gifts

(1) Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except to the extent permitted by subsection (2). 20

(2) The donee may make gifts –

- (a) on customary occasions to persons (including himself) who are related to or connected with the donor, or
- (b) to any charity to whom the donor made or might have been expected to make gifts,

if the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate. 25

(3) “Customary occasion” means –

- (a) the occasion of or the anniversary of a birth or marriage, or
- (b) any other occasion on which presents are customarily given within families or among friends or associates.

(4) Subsection (2) is subject to any conditions or restrictions in the instrument. 30

## 12 Revocation of lasting powers of attorney etc.

(1) This section applies if –

- (a) P has executed an instrument with a view to creating a lasting power of attorney, or
- (b) a lasting power of attorney is registered as having been conferred by P, and in this section references to revoking the power include revoking the instrument. 40

(2) P may, at any time when he has capacity to do so, revoke the power.

(3) P's bankruptcy revokes the power in so far as it relates to P's property and affairs.

(4) The occurrence in relation to a donee of an event given in subsection (5) –

- (a) terminates the donee's appointment, and
- (b) except in the cases given in subsection (6), revokes the power.

(5) The events are –

- (a) the disclaimer of the appointment by the donee in accordance with such requirements as may be prescribed;
- (b) subject to subsection (7), the death or bankruptcy of the donee or, if the donee is a trust corporation, its winding-up or dissolution;
- (c) subject to subsection (8), the dissolution or annulment of a marriage between the donor and the donee;
- (d) the lack of capacity of the donee.

(6) The cases are –

- (a) the donee is replaced under the terms of the instrument;
- (b) the donee is one of two or more persons appointed to act as donees jointly and severally and, after the event in question, at least one donee remains whose appointment still has effect.

(7) The bankruptcy of a donee does not terminate his appointment, or revoke the power, in so far as his authority relates to P's personal welfare.

(8) The dissolution or annulment of a marriage does not terminate the appointment of a donee, or revoke the power, if the instrument provided that it was not to do so.

(9) “Prescribed” means prescribed by regulations made by the Lord Chancellor.

**13 Protection of donee and others if no power created or power revoked**

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(1) Subsections (2) and (3) apply if –

- (a) an instrument has been registered under Schedule 1 as a lasting power of attorney, but
- (b) a lasting power of attorney was not created, whether or not the registration has been cancelled at the time of the act or transaction in question.

(2) A donee who acts in purported exercise of the power does not incur any liability (to P or any other person) because of the non-existence of the power unless at the time of acting he –

- (a) knows that a lasting power of attorney was not created, or
- (b) is aware of events, facts or circumstances which, if a lasting power of attorney had been created, would have terminated his authority to act as a donee.

(3) Any transaction between the donee and another person is, in favour of that person, as valid as if the power had been in existence, unless at the time of the transaction that person has knowledge of a matter referred to in subsection (2).

(4) If the interest of a purchaser depends on whether a transaction between the donee and the other person was valid by virtue of subsection (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if –

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- (a) the transaction between that person and the donee was completed within 12 months of the date on which the instrument was registered, or
- (b) that person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction.

(5) In its application to a lasting power of attorney which relates to matters in addition to P's property and affairs, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection where power is revoked) has effect as if references to revocation included the cessation of the power in relation to P's property and affairs.

(6) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

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*General powers of the court and appointment of deputies*

**14 Meaning of “the court”**

- (1) In this Act “the court” means the Court of Protection established under Part 2.
- (2) The Lord Chancellor may by order make provision as to the transfer of proceedings relating to a child, in such circumstances as are specified in the order—
  - (a) from the Court of Protection to a court having jurisdiction under the Children Act 1989 (c. 41), or
  - (b) from a court having jurisdiction under the 1989 Act to the Court of Protection.
- (3) “Child” means a person who has not reached 18.

**15 Power to make declarations**

The court may make declarations as to—

- (a) whether a person has or lacks capacity to make a decision specified in the declaration;
- (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;
- (c) the lawfulness or otherwise of an act, omission or course of conduct in relation to that person.

**16 Powers to make decisions and appoint deputies: general**

- (1) This section applies if a person (“P”) lacks capacity in relation to a matter or matters concerning P's personal welfare or property and affairs.
- (2) The court may—
  - (a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
  - (b) appoint a person (a “deputy”) to make decisions on P's behalf in relation to the matter or matters.

(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to section 4 (best interests). 5

(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4(2)) to the principles that –

- (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
- (b) the powers conferred on a deputy should be as limited in scope and duration as possible.

(5) The court may make such further orders or give such directions, and confer on a deputy such powers, as it thinks necessary or expedient for giving effect to an order or appointment made by it under subsection (2). 10

(6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms. 15

(7) An order of the court may be varied or discharged by a subsequent order. 20

## **17 Section 16 powers: personal welfare**

(1) The powers under section 16 as respects P's personal welfare extend in particular to –

- (a) deciding where P is to live;
- (b) deciding what contact, if any, P is to have with any specified persons;
- (c) making an order prohibiting a named person from having contact with P;
- (d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P; 25
- (e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.

(2) Subsection (1) is subject to section 20 (restrictions on deputies). 30

## **18 Section 16 powers: property and affairs**

(1) The powers under section 16 as respects P's property and affairs extend in particular to –

- (a) the control and management of P's property;
- (b) the sale, exchange, charging, gift or other disposition of P's property;
- (c) the acquisition of property in P's name or on P's behalf;
- (d) the carrying on, on P's behalf, of any profession, trade or business; 35
- (e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member;
- (f) the carrying out of any contract entered into by P;
- (g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not; 40
- (h) the settlement of any of P's property, whether for P's benefit or for the benefit of others;
- (i) the execution for P of a will;

- (j) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise;
- (k) the conduct of legal proceedings in P's name or on P's behalf.

(2) No will may be made under subsection (1)(i) at a time when P is under the age of 18. 5

(3) The powers under section 16 as respects any other matter relating to P's property and affairs may be exercised even though P has not reached 16, if the court considers it likely that P will still lack capacity to make decisions in respect of that matter when he reaches 18.

(4) Schedule 2 supplements the provisions of this section. 10

(5) Section 16(7) (variation and discharge of court orders) is subject to paragraph 6 of Schedule 2.

(6) Subsection (1) is subject to section 20 (restrictions on deputies). 10

## 19 Appointment of deputies

- (1) A deputy appointed by the court must be— 15
  - (a) an individual who has reached 18, or
  - (b) as respects powers in relation to property and affairs, an individual who has reached 18 or a trust corporation.
- (2) The court may appoint an individual by appointing the holder for the time being of a specified office or position. 20
- (3) A person must not be appointed as a deputy without his consent.
- (4) The court may appoint two or more deputies to act—
  - (a) jointly, or
  - (b) jointly and severally.
- (5) When appointing a deputy or deputies, the court may at the same time appoint one or more other persons to succeed the existing deputy or those deputies— 25
  - (a) in such circumstances, or on the happening of such events, as may be specified by the court;
  - (b) for such period as may be so specified.
- (6) A deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part. 30
- (7) The deputy is entitled—
  - (a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and
  - (b) if the court so directs when appointing him, to remuneration out of P's property for discharging them. 35
- (8) The court may confer on a deputy powers to—
  - (a) take possession or control of all or any specified part of P's property;
  - (b) exercise all or any specified powers in respect of it, including such powers of investment as the court may determine. 40
- (9) The court may require a deputy—

- (a) to give to the Public Guardian such security as the court thinks fit for the due discharge of his functions, and
- (b) to submit to the Public Guardian such reports at such times or at such intervals as the court may direct.

**20 Restrictions on deputies**

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- (1) A deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has recovered capacity in relation to the matter.
- (2) Nothing in section 16(5) or 17 permits a deputy to be given power –
  - (a) to prohibit a named person from having contact with P;
  - (b) to direct a person responsible for P's health care to allow a different person to take over that responsibility.
- (3) A deputy may not be given powers with respect to –
  - (a) the settlement of any of P's property, whether for P's benefit or for the benefit of others,
  - (b) the execution for P of a will, or
  - (c) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise.
- (4) A deputy may not be given power to make a decision on behalf of P which is inconsistent with a decision made, within the scope of his authority and in accordance with this Act, by the donee of a lasting power of attorney granted by P (or, if there is more than one donee, by any of them).

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*Powers of the court in relation to lasting powers of attorney*

**21 Powers of court in relation to validity of lasting powers of attorney**

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- (1) This section and section 22 apply if –
  - (a) a person ("P") has executed or purported to execute an instrument with a view to creating a lasting power of attorney, or
  - (b) an instrument has been registered as a lasting power of attorney conferred by P.
- (2) The court may determine any question relating to –
  - (a) whether the requirements for the creation of a lasting power of attorney have been met;
  - (b) whether the power has been revoked or has otherwise come to an end.
- (3) Subsection (4) applies if the court is satisfied –
  - (a) that fraud or undue pressure was used to induce P –
    - (i) to execute an instrument for the purpose of creating a lasting power of attorney, or
    - (ii) to create a lasting power of attorney, or
  - (b) that the donee or intended donee of a lasting power of attorney –
    - (i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or
    - (ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests.

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(4) The court may –

- direct that an instrument purporting to create the lasting power of attorney is not to be registered, or
- if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.

(5) Where two or more donees are appointed under a lasting power of attorney, this section and section 22 apply as if references to the donee were to all or any of them.

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## 22 Powers of court in relation to operation of lasting powers of attorney

(1) The court may determine any question as to the meaning or effect of a lasting power of attorney. 10

(2) The court may –

- give directions with respect to decisions –
  - which the donee of a lasting power of attorney (or, if more than one, any of them) has authority to make, and
  - which P lacks capacity to make, and
- give any consent or authorisation to act which the donee would have to obtain from P if he had capacity to give it.

(3) The court may, if P lacks capacity to do so –

- give directions to the donee with respect to the rendering by him of reports or accounts and the production of records kept by him for that purpose;
- require the donee to supply information or produce documents or things in his possession as donee;
- give directions with respect to the remuneration or expenses of the donee;
- relieve the donee wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as donee.

(4) The court may authorise the making of gifts which are not within section 11(2) (permitted gifts). 30

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### *Advance decisions to refuse treatment*

## 23 Advance decisions to refuse treatment: general

(1) In this section and sections 24 and 25 “advance decision” means a decision made by a person (“P”), after he has reached 18 and when he has capacity to do so, that if –

- at a later time and in such circumstances as he may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for him, and
- at that time he lacks capacity to consent to the carrying out or continuation of the treatment,

the specified treatment is not to be carried out or continued. 40

(2) For the purposes of subsection (1)(a), a decision may be regarded as specifying a treatment or circumstances even though it is expressed in broad terms or non-scientific language.

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(3) An advance decision may be withdrawn or altered by P at any time when he has capacity to do so.

**24 Validity and applicability of advance decisions**

(1) The lawfulness or otherwise of carrying out or continuing a treatment in P's case is not affected by P's advance decision unless the decision is at the material time—

(a) valid, and  
(b) applicable to the treatment.

(2) An advance decision is not valid if P—

(a) has withdrawn the decision at a time when he had capacity to do so,  
(b) has, under a lasting power of attorney created after the advance decision was made, conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates, or  
(c) has done anything else clearly inconsistent with the advance decision remaining his fixed decision.

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(3) An advance decision is not applicable to the treatment in question if at the material time P has capacity to give or refuse consent to it.

(4) An advance decision is not applicable to the treatment in question if—

(a) that treatment is not the treatment specified in the advance decision,  
(b) any circumstances specified in the advance decision are absent, or  
(c) circumstances exist which were not anticipated by P at the time of the advance decision and which would have affected his decision had he anticipated them.

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(5) An advance decision is not applicable to life-sustaining treatment unless P specified that his decision was to apply to such treatment.

(6) The existence of any lasting power of attorney other than one of a description mentioned in subsection (2)(b) does not prevent the advance decision from being regarded as valid and applicable.

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**25 Effect of advance decisions**

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(1) Subject to subsection (2), if P has made an advance decision which is—

(a) valid, and  
(b) applicable to a treatment,

the decision has effect as if he had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued.

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(2) A person does not incur liability for carrying out or continuing the treatment if, at the time—

(a) he does not know, and  
(b) he has no reasonable grounds for believing,

that an advance decision exists which is valid and applicable to the treatment.

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(3) A person who withholds or withdraws a treatment from P in the belief that a valid advance decision is applicable to the treatment is not liable for the consequences of doing so if his belief is reasonable.

(4) The court may make a declaration as to whether a valid advance decision that is applicable to a treatment exists.

(5) Nothing in an apparent advance decision stops a person—

- (a) providing life-sustaining treatment, or
- (b) doing any act reasonably believed to be necessary to prevent a serious deterioration in P's condition,

while a ruling as respects any relevant issue is sought from the court.

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*Excluded decisions*

**26 Family relationships etc.**

Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person—

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- (a) consent to marriage;
- (b) consent to have sexual relations;
- (c) consent to a divorce petition on the basis of two years' separation;
- (d) consent to a child being placed for adoption by an adoption agency;
- (e) consent to the making of a future adoption order;
- (f) consent to the making of an adoption order;
- (g) discharging parental responsibilities in matters not relating to a child's property;
- (h) giving a consent under the Human Fertilisation and Embryology Act 1990 (c. 37).

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**27 Mental Health Act matters**

(1) Nothing in this Act authorises anyone—

- (a) to give a patient a medical treatment for mental disorder, or
- (b) to consent to a patient being given a medical treatment for mental disorder,

if the giving of the treatment to the patient is regulated by Part 4 of the Mental Health Act.

(2) “The Mental Health Act” means the Mental Health Act 1983 (c. 20); and “medical treatment”, “mental disorder” and “patient” have the same meaning as in that Act.

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**28 Transplants**

Nothing in this Act permits a decision to be made on behalf of a person under the Human Organ Transplants Act 1989 (c. 31).

**29 Voting rights**

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Nothing in this Act permits a decision on voting at an election for any public office to be made on behalf of a person.

*Miscellaneous and supplementary*

**30 Codes of practice**

(1) The Lord Chancellor must prepare a code or codes of practice –

- (a) for the guidance of persons assessing whether a person has capacity in relation to any matter,
- (b) for the guidance of persons acting under the general authority,
- (c) for the guidance of donees of lasting powers of attorney,
- (d) for the guidance of deputies appointed by the court, and
- (e) with respect to such other matters concerned with this Part as he thinks fit.

(2) The Lord Chancellor may from time to time revise any such code.

(3) Before preparing or revising a code of practice the Lord Chancellor must consult such persons as he thinks appropriate.

(4) The Lord Chancellor may delegate the preparation of the whole or any part of a code of practice so far as he considers expedient.

(5) The Lord Chancellor must publish any code of practice he has prepared or revised and lay copies of it before Parliament.

(6) It is the duty of a person to have regard to any relevant code of practice if he is acting –

- (a) in relation to a person who lacks capacity, and
- (b) in a professional capacity or for remuneration.

(7) A code of practice –

- (a) is admissible in evidence in any civil or criminal proceedings, and
- (b) may be taken into account by the court in any case in which it appears to the court to be relevant.

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**31 Ill-treatment and neglect**

(1) A person is guilty of an offence if he –

- (a) has the care of a person who lacks or is reasonably believed to lack capacity, or is the donee of a lasting power of attorney or a deputy appointed for a person by the court, and
- (b) ill-treats or wilfully neglects the person of whom he has care or to whom the lasting power of attorney or the appointment relates.

(2) A person guilty of an offence under this section is liable –

- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
- (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.

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**32 Concealing or destroying advance decision to refuse treatment**

(1) A person is guilty of an offence if, with intent to deceive, he conceals or destroys another person's written advance decision made for the purposes of section 23 to 25 (advance decisions to refuse treatment).

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(2) A person guilty of an offence under this section is liable—  
 (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;  
 (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.

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### 33 Payment for necessary goods and services

(1) If necessary goods are supplied to, or necessary services are provided for, a person who lacks capacity to contract, a reasonable price must be paid for them by that person or a person acting for that person.  
 (2) “Necessary” means suitable to a person’s condition in life and to his actual requirements at the time when the goods are supplied or the services provided.

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## PART 2

### THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN

#### *The Court of Protection*

### 34 The Court of Protection

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(1) There shall be a superior court of record known as the Court of Protection.  
 (2) The court may sit at any place in England and Wales, on any day and at any time.  
 (3) The court shall have a central office and registry at a place appointed by the Lord Chancellor.  
 (4) The Lord Chancellor may designate as additional registries of the court any district registry of the High Court and any county court office.  
 (5) The office of the Supreme Court called the Court of Protection shall cease to exist.

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### 35 The judges of the Court of Protection

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(1) Subject to section 36(2), the jurisdiction of the Court of Protection is exercisable by a judge nominated for that purpose by—  
 (a) the Lord Chancellor, or  
 (b) a person acting on the Lord Chancellor’s behalf.  
 (2) To be nominated, a judge must be—  
 (a) the President of the Family Division,  
 (b) the Vice-Chancellor,  
 (c) a puisne judge of the High Court,  
 (d) a circuit judge, or  
 (e) a district judge.  
 (3) The Lord Chancellor must—  
 (a) appoint one of the judges nominated by virtue of subsection (2)(a) to (c) to be President of the Court of Protection, and

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(b) appoint another of those judges to be Vice-President of the Court of Protection.

(4) The Lord Chancellor must appoint one of the judges nominated by virtue of subsection (2)(d) or (e) to be Senior Judge of the Court of Protection, having such administrative functions in relation to the court as the Lord Chancellor may direct.

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**36 Officers and staff of the Court of Protection**

(1) Officers and staff may be appointed for the Court of Protection under section 2(1) of the Courts Act 2003.

(2) Court of Protection Rules may provide for the exercise of the jurisdiction of the court, in such circumstances as may be prescribed by the rules, by its officers or other staff.

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*Supplementary powers*

**37 General powers and effect of orders etc.**

(1) The Court of Protection has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.

(2) Section 204 of the Law of Property Act 1925 (c. 20) (orders of High Court conclusive in favour of purchasers) applies in relation to orders and directions of the court as it applies to orders of the High Court.

(3) Office copies of orders made, directions given or other instruments issued by the court and sealed with its official seal are admissible in all legal proceedings as evidence of the originals without any further proof.

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**38 Interim orders and directions**

On an application to it in relation to a person (“P”), the court may, pending the determination of the application, make an order or give directions in respect of any matter if –

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(a) there is reason to believe that P lacks capacity in relation to the matter,  
(b) the matter is one to which its powers under this Act extend, and  
(c) it is in P’s best interests both to make the order or give the directions and to do so without delay.

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**39 Power to call for reports**

(1) This section applies where proceedings are brought in respect of a person (“P”) under Part 1.

(2) When considering in the proceedings any question relating to P the court may –

(a) require a report to be made to it, on such matters relating to P as the court directs, by –

(i) the Public Guardian, or  
(ii) a Lord Chancellor’s Visitor, or

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- (b) require a local authority to arrange for such a report to be made by one of its officers or such other person (other than a person referred to in paragraph (a)) as the authority considers appropriate.
- (3) A report under subsection (2) may be made in writing or orally as the court may require. 5
- (4) If the Lord Chancellor's Visitor who is making a visit under such a requirement is a Medical Visitor, he—
  - (a) may, if the court so directs, carry out a medical examination of P in private, and
  - (b) may require the production of, and inspect, any medical records relating to P. 10
- (5) Court of Protection Rules may specify matters which, unless the court orders otherwise, must be dealt with in a report under this section.
- (6) It is the duty of any person requested to produce a report under subsection (2) to comply with the request. 15

*Practice and procedure*

**40 Applications to the Court of Protection**

- (1) No permission is required for an application to the Court of Protection for the exercise of any of its powers under this Act—
  - (a) by or in the name or on behalf of a person who lacks, or is alleged to lack, capacity,
  - (b) if such a person has not reached 18, by anyone with parental responsibility for him,
  - (c) by the donor of a lasting power of attorney to which the application relates,
  - (d) by a donee of a lasting power of attorney to which the application relates,
  - (e) by a deputy appointed by the court for a person to whom the application relates, or
  - (f) by a person named in an existing order of the court, if the application relates to the order. 20
- (2) But, subject to Court of Protection Rules, permission is required in the case of any other application to the court.
- (3) In deciding whether to grant permission the court must in particular have regard to—
  - (a) the applicant's connection with the person to whom the application relates;
  - (b) the reasons for the application;
  - (c) the benefit to the person to whom the application relates of a proposed order or directions;
  - (d) whether the benefit can be achieved in any other way. 25
- (4) "Parental responsibility" has the same meaning as in the Children Act 1989 (c. 41). 35

**41 Court of Protection Rules**

(1) The Lord Chancellor may make rules of court (to be called “Court of Protection Rules”) with respect to the practice and procedure of the court.

(2) Court of Protection Rules may in particular make provision –

- (a) as to the manner and form in which proceedings are to be commenced;
- (b) as to the persons entitled to be notified of, and be made parties to, the proceedings;
- (c) for the allocation, in such circumstances as may be specified, of any specified description of proceedings to a specified judge or to specified descriptions of judges;
- (d) for enabling the court to appoint a suitable person (who may, with his consent, be the Official Solicitor) to represent the person to whom the proceedings relate or to act as that person’s litigation friend;
- (e) for enabling an application to the court to be disposed of without a hearing;
- (f) for enabling the court to proceed with, or with any part of, a hearing in the absence of the person to whom the proceedings relate;
- (g) for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public;
- (h) as to what may be received as evidence (whether or not admissible apart from the rules) and the manner in which it is to be presented;
- (i) for the enforcement of orders made and directions given in the proceedings.

(3) Court of Protection Rules may contain such incidental and supplementary provisions as the Lord Chancellor thinks necessary or expedient.

(4) Court of Protection Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions.

**42 Practice directions**

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(1) The President of the Court of Protection may, with the concurrence of the Lord Chancellor, give directions as to the practice and procedure of the court.

(2) Directions as to the practice and procedure of the Court of Protection may not be given by anyone other than the President of the Court of Protection without the approval of the President of the Court of Protection and the Lord Chancellor.

(3) Nothing in this section prevents the President of the Court of Protection, without the concurrence of the Lord Chancellor, giving directions which contain guidance as to law or making judicial decisions.

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**43 Rights of appeal**

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(1) Subject to the provisions of this section, an appeal lies to the Court of Appeal from any decision of the Court of Protection.

(2) Court of Protection Rules may provide that where a decision of the court is made by –

(a) a person exercising the jurisdiction of the court under section 36(2),  
 (b) a district judge, or  
 (c) a circuit judge,  
 an appeal from that decision lies to a prescribed higher judge of the court and  
 not to the Court of Appeal. 5

(3) For the purposes of this section the higher judges of the court are—  
 (a) in relation to any person mentioned in subsection (2), one of the judges  
 nominated by virtue of section 35(2)(a) to (c);  
 (b) in relation to a person mentioned in subsection (2)(a), a circuit judge or  
 a district judge;  
 (c) in relation to a person mentioned in subsection (2)(b), a circuit judge. 10

(4) Court of Protection Rules may make provision—  
 (a) that, in such cases as may be prescribed, an appeal from a decision of  
 the court may not be made without permission;  
 (b) as to the person or persons entitled to grant permission to appeal; 15  
 (c) as to any requirements to be satisfied before permission is granted;  
 (d) that where a higher judge of the court makes a decision on an appeal,  
 no appeal may be made to the Court of Appeal from that decision  
 unless the Court of Appeal considers that—  
 (i) the appeal would raise an important point of principle or  
 practice, or  
 (ii) there is some other compelling reason for the Court of Appeal  
 to hear it; 20  
 (e) as to any considerations to be taken into account in relation to granting  
 or refusing permission to appeal. 25

*Fees and costs*

**44 Fees**

(1) The Lord Chancellor may with the consent of the Treasury by order prescribe fees payable in respect of anything dealt with by the Court of Protection. 30

(2) An order under this section may in particular contain provision as to—  
 (a) scales or rates of fees;  
 (b) exemptions from and reductions in fees;  
 (c) remission of fees in whole or in part.

(3) Before making an order under this section, the Lord Chancellor must consult—  
 (a) the President of the Court of Protection,  
 (b) the Vice-President of the Court of Protection, and  
 (c) the Senior Judge of the Court of Protection. 35

(4) The Lord Chancellor must take such steps as are reasonably practicable to bring information about fees to the attention of persons likely to have to pay them. 40

(5) Fees payable under this section are recoverable summarily as a civil debt.

**45 Costs**

(1) Subject to Court of Protection Rules, the costs of and incidental to all proceedings in the Court of Protection are in the discretion of the court.

(2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives. 5

(3) The court has full power to determine by whom and to what extent the costs are to be paid.

(4) The court may, in any proceedings –  
    (a) disallow, or  
    (b) order the legal or other representatives concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with the rules. 10

(5) In subsection (4), “wasted costs” means any costs incurred by a party –  
    (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or  
    (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay. 15

(6) “Legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf. 20

**46 Fees and costs: supplementary**

(1) Court of Protection Rules may make provision –  
    (a) as to the way in which, and funds from which, fees and costs are to be paid;  
    (b) for charging fees and costs upon the estate of the person to whom the proceedings relate;  
    (c) for the payment of fees and costs within a specified time of the death of the person to whom the proceedings relate or the conclusion of the proceedings. 25

(2) A charge on the estate of a person created by virtue of subsection (1)(b) does not cause any interest of the person in any property to fail or determine or to be prevented from recommencing. 30

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*The Public Guardian*

**47 The Public Guardian**

(1) For the purposes of this Act there shall be an officer, to be known as the Public Guardian, who shall be appointed by the Lord Chancellor.

(2) There shall be paid to the Public Guardian out of money provided by Parliament such salary as the Lord Chancellor may determine. 40

## 48 Functions of the Public Guardian

(1) The Public Guardian has the following functions –

- (a) establishing and maintaining a register of lasting powers of attorney;
- (b) establishing and maintaining a register of orders appointing deputies;
- (c) supervising donees of lasting powers of attorney and deputies appointed by the court;
- (d) directing a Lord Chancellor's Visitor to visit –
  - (i) a donee of a lasting power of attorney, or
  - (ii) a deputy appointed by the court,
 and to make a report to the Public Guardian on such matters as he may direct;
- (e) receiving security which the court requires a person to give for the discharge of his functions;
- (f) receiving reports from donees of lasting powers of attorney and deputies appointed by the court;
- (g) reporting to the court on such matters relating to proceedings under this Act as the court requires;
- (h) dealing with complaints about the way in which a donee of a lasting power of attorney or a deputy appointed by the court is exercising his powers.

(2) The Lord Chancellor may by regulations make provision –

- (a) conferring on the Public Guardian other functions in connection with this Act;
- (b) in connection with the discharge by the Public Guardian of his functions.

(3) Regulations made under subsection (2)(b) may in particular make provision –

- (a) as to the giving of security by deputies appointed by the court and as to the enforcement and discharge of security so given;
- (b) as to the fees which may be charged by the Public Guardian;
- (c) as to the way in which, and funds from which, such fees are to be paid;
- (d) as to making of reports to the Public Guardian by deputies appointed by the court and others who are directed by the court to carry out any transaction for a person who lacks capacity.

*Lord Chancellor's Visitors*

## 49 Lord Chancellor's Visitors

(1) A Lord Chancellor's Visitor is a person who is appointed by the Lord Chancellor to –

- (a) a panel of Medical Visitors, or
- (b) a panel of General Visitors.

(2) A person is not qualified to be a Medical Visitor unless he –

- (a) is a registered medical practitioner, and
- (b) appears to the Lord Chancellor to have special knowledge of and experience in cases of impairment of or disturbance in the functioning of the mind or brain;

but a General Visitor need not possess a medical qualification.

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(3) A Lord Chancellor's Visitor—  
(a) may be appointed for such term and subject to such conditions, and  
(b) may be paid such remuneration and allowances,  
as the Lord Chancellor may determine.

**PART 3**

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**GENERAL**

**50 Interpretation**

(1) In this Act—  
“local authority” means the council of a county, a metropolitan district or a London borough or the Common Council of the City of London;  
“property” includes any thing in action and any interest in real or personal property;  
“purchaser” and “purchase” have the meaning given in section 205(1) of the Law of Property Act 1925 (c. 20);  
“treatment” includes a diagnostic or other procedure;  
“trust corporation” has the same meaning as in the Trustee Act 1925 (c. 19);  
“will” includes codicil.

(2) In this Act references to making decisions, in relation to a donee of a lasting power of attorney or a deputy appointed by the court, include, where appropriate, acting on decisions made.

(3) In this Act the expressions listed below are defined or otherwise explained by the provisions indicated—

advance decision	section 23(1)	
the court	section 14	25
Court of Protection Rules	section 41(1)	
deputy	section 16(2)(b)	
the general authority	section 6	
lack of capacity	section 1	
lasting power of attorney	section 8(1)	30
Lord Chancellor's Visitor	section 49	
life-sustaining treatment	section 7(4)	
mental disorder	section 27(2)	
the Mental Health Act	section 27(2)	
Public Guardian	section 47	35

**51 Rules, regulations and orders**

(1) Any power of the Lord Chancellor to make rules, regulations or orders under this Act is exercisable by statutory instrument.

(2) Any such statutory instrument, other than one containing an order under section 53, is subject to annulment in pursuance of a resolution of either House of Parliament.

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(3) Any power of the Lord Chancellor to make rules, regulations or orders under this Act includes power to make—  
 (a) any supplementary or incidental provision, and  
 (b) any transitional or saving provision,  
 which he considers necessary or expedient.

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**52 Existing receivers and enduring powers of attorney etc.**

(1) The following provisions cease to have effect—  
 (a) Part 7 of the Mental Health Act;  
 (b) the Enduring Powers of Attorney Act 1985 (c. 29).

(2) No enduring power of attorney within the meaning of the 1985 Act is to be created after the coming into force of this Act. 10

(3) Schedule 3 has effect in place of the 1985 Act in relation to any enduring power of attorney created before the coming into force of this Act.

(4) Schedule 4 contains transitional provisions and savings in relation to Part 7 of the Mental Health Act and the 1985 Act. 15

**53 Commencement and extent**

(1) This Act comes into force in accordance with provision made by order by the Lord Chancellor.

(2) An order under this section may appoint different days for different provisions and different purposes. 20

(3) Subject to subsection (4), this Act extends to England and Wales only.

(4) The following provisions extend to the whole of the United Kingdom—  
 (a) paragraph 12(1) of Schedule 1 (evidence of instruments and of registration of lasting powers of attorney);  
 (b) paragraph 14(3) of Schedule 3 (evidence of instruments and of registration of enduring powers of attorney). 25

**54 Short title**

This Act may be cited as the Mental Incapacity Act 2003.

## SCHEDULES

### SCHEDULE 1

Section 8

#### LASTING POWERS OF ATTORNEY: REGISTRATION ETC.

##### PART 1

###### EXECUTION OF INSTRUMENTS

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###### *General requirements as to execution of instruments*

1 (1) An instrument is not executed in accordance with this Schedule unless –

- (a) it is in the prescribed form,
- (b) it complies with paragraph 2, and
- (c) it fulfils any other prescribed requirements as to its execution.

(2) Regulations may make different provision according to whether –

- (a) the instrument relates to personal welfare, property and affairs or both;
- (b) only one or more than one donee is to be appointed (and if so whether jointly or jointly and severally).

(3) In this Schedule –

- (a) “prescribed” means prescribed by regulations, and
- (b) “regulations” means regulations made for the purposes of this Schedule by the Lord Chancellor.

###### *Requirements as to content of instruments*

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2 (1) The instrument must include –

- (a) the prescribed information about the purpose of the instrument and the effect of a lasting power of attorney,
- (b) a statement by the donor to the effect that he –

- (i) has read the prescribed information or a prescribed part of it (or has had it read to him), and
- (ii) intends the authority conferred under the instrument to include authority to make decisions on his behalf in circumstances where he no longer has capacity,

- (c) a statement by the donor –

- (i) naming a person or persons whom the donor wishes to be notified of any application for the registration of the instrument, or
- (ii) stating that there are no persons whom he wishes to be notified of any such application,

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(d) a statement by the donee (or, if more than one, each of them) to the effect that he—

- (i) has read the prescribed information or a prescribed part of it, and
- (ii) understands the duty imposed on a donee of a lasting power of attorney under section 4 (best interests), and

(e) a certificate signed by a person of a prescribed description as to the capacity of the donor.

(2) Regulations may prescribe a maximum number of persons who may be named under sub-paragraph (1)(c). 10

(3) The persons who may be so named do not include a person who is appointed as donee under the instrument.

(4) In this Schedule “named person” means a person named under sub-paragraph (1)(c). 15

*Failure to comply with prescribed form*

3 (1) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form, it is to be treated by the Public Guardian as sufficient in point of form and expression. 20

(2) The court may declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney. 25

PART 2

REGISTRATION

*Applications for registration and registration*

4 (1) An application to the Public Guardian for the registration of an instrument intended to create a lasting power of attorney—

- (a) must be made in the prescribed form, and
- (b) must include any prescribed information.

(2) The application may be made—

- (a) by the donor,
- (b) by the donee or donees, or
- (c) if the instrument appoints two or more donees to act jointly and severally, by any of the donees. 30

(3) The application must be accompanied by—

- (a) the instrument, and
- (b) any fee provided for under section 48(3)(b). 35

5 Subject to paragraphs 9 and 10, the Public Guardian must register the instrument as a lasting power of attorney at the end of the prescribed period. 40

*Notification requirements*

6 (1) As soon as is practicable after receiving an application made by the donor under paragraph 4(2)(a), the Public Guardian must notify— 40

(a) the donee or donees, and  
 (b) any named persons,  
 that the application has been received.

(2) A notice under sub-paragraph (1) must explain the effect of paragraph 9.

7 (1) As soon as is practicable after receiving an application by a donee or donees under paragraph 4(2)(b), the Public Guardian must notify –  
 (a) the donor, and  
 (b) any named persons,  
 that the application has been received.

(2) As soon as is practicable after receiving an application by a donee under paragraph 4(2)(c), the Public Guardian must notify –  
 (a) the donor,  
 (b) the donee or donees who have not joined in making the application, and  
 (c) any named persons,  
 that the application has been received.

(3) A notice under sub-paragraph (1) or (2) must explain the effect of paragraphs 9 and 10.

*Power to dispense with notification requirements*

8 The court may –  
 (a) on the application of the donor, dispense with a requirement to notify under paragraph 6(1), or  
 (b) on the application of the donee or donees who made the application for registration, dispense with a requirement to notify under paragraph 7,  
 if satisfied that no useful purpose would be served by giving the notice.

*Objection by donee or named person*

9 (1) Sub-paragraph (2) applies if a donee or a named person –  
 (a) receives a notice under paragraph 6 or 7 of an application for the registration of an instrument, and  
 (b) before the end of the prescribed period, gives notice to the Public Guardian of an objection to the registration on the ground that an event given in section 12(3) or (5)(a) to (c) has occurred which has revoked the instrument.

(2) The Public Guardian must not register the instrument if he is satisfied that the ground for making the objection is established.

(3) Sub-paragraph (4) applies if a donee or a named person –  
 (a) receives a notice under paragraph 6 or 7 of an application for the registration of an instrument, and  
 (b) before the end of the prescribed period –  
 (i) makes an application to the court objecting to the registration on a prescribed ground, and  
 (ii) notifies the Public Guardian of the application.

(4) The Public Guardian must not register the instrument unless the court directs him to do so.

*Objection by donor*

10 (1) This paragraph applies if the donor—

- (a) receives a notice under paragraph 7 of an application for the registration of an instrument, and
- (b) before the end of the prescribed period, gives notice to the Public Guardian of an objection to the registration.

(2) The Public Guardian must not register the instrument unless the court, on the application of the donee or, if more than one, any of them—

- (a) is satisfied that the donor lacks capacity to object to the registration, and
- (b) directs the Public Guardian to register the instrument.

*Notification of registration*

11 Where an instrument is registered under this Schedule, the Public Guardian must give notice of the fact in the prescribed form to—

- (a) the donor,
- (b) the donee or, if more than one, each of them, and
- (c) any named persons.

*Evidence of registration*

12 (1) A document purporting to be an office copy of an instrument registered under this Schedule is, in any part of the United Kingdom, evidence of—

- (a) the contents of the instrument, and
- (b) the fact that it has been registered.

(2) Sub-paragraph (1) is without prejudice to—

- (a) section 3 of the Powers of Attorney Act 1971 (c. 27) (proof by certified copy), and
- (b) any other method of proof authorised by law.

PART 3

CANCELLATION OF REGISTRATION

13 (1) The Public Guardian must cancel the registration of an instrument as a lasting power of attorney on being satisfied that the power has been revoked—

- (a) as a result of the donor's bankruptcy, or
- (b) on the occurrence of any of the events given in section 12(5)(a) to (c).

(2) If the Public Guardian cancels the registration of an instrument he must notify—

- (a) the donor, and
- (b) the donee or, if more than one, each of them.

14 The court must direct the Public Guardian to cancel the registration of an instrument as a lasting power of attorney if it—

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- (a) determines under section 21(2)(a) that a requirement for creating the power was not met,
- (b) determines under section 21(2)(b) that the power has been revoked or has otherwise come to an end, or
- (c) revokes the power under section 21(4)(b) (fraud etc.).

15 On the cancellation of the registration of an instrument, the instrument and any office copies of it must be delivered up to be cancelled. 5

#### PART 4

##### RECORDS OF ALTERATIONS IN REGISTERED POWERS

*Partial revocation of power as a result of bankruptcy*

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16 If in the case of a registered instrument it appears to the Public Guardian that under section 12 a lasting power of attorney is revoked in relation to the donor's property and affairs (but not in relation to other matters), the Public Guardian must attach to the instrument a note to that effect.

*Termination of appointment of donee which does not revoke power*

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17 If in the case of a registered instrument it appears to the Public Guardian that an event has occurred –

- (a) which has terminated the appointment of the donee, but
- (b) which has not revoked the instrument,

the Public Guardian must attach to the instrument a note to that effect. 20

*Replacement of donee*

18 If in the case of a registered instrument it appears to the Public Guardian that the donee has been replaced under the terms of the instrument the Public Guardian must attach to the instrument a note to that effect.

*Notification of alterations*

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19 If the Public Guardian attaches a note to an instrument under paragraph 16, 17 or 18 he must give notice of the note to the donee or donees of the power (or, as the case may be, to the other donee or donees of the power).

#### SCHEDULE 2

Section 18(4)

##### PROPERTY AND AFFAIRS: SUPPLEMENTARY PROVISIONS

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*Wills: general*

1 Paragraphs 2 to 4 apply in relation to the execution of a will, by virtue of section 18, on behalf of P.

*Provision that may be made in will*

2 The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it.

*Wills: requirements relating to execution*

3 (1) Sub-paragraph (2) applies if under section 16 the court makes an order or gives directions requiring or authorising a person ("the authorised person") to execute a will on behalf of P.

(2) Any will executed in pursuance of the order or direction –

- (a) must state that it is signed by P acting by the authorised person,
- (b) must be signed by the authorised person with the name of P and his own name, in the presence of two or more witnesses present at the same time, and
- (c) must be attested and subscribed by those witnesses in the presence of the authorised person.

*Effect of will executed in accordance with paragraph 3*

4 (1) This paragraph applies where a will is executed in accordance with paragraph 3.

(2) The Wills Act 1837 (c. 26) has effect in relation to the will as if it were signed by P by his own hand, except that –

- (a) section 9 of the 1837 Act (requirements as to signing and attestation) does not apply, and
- (b) in the subsequent provisions of the 1837 Act any reference to execution in the manner required by the previous provisions shall be read as a reference to execution in accordance with paragraph 3.

(3) Subject to sub-paragraph (4), the will has the same effect for all purposes as if –

- (a) P had had the capacity to make a valid will, and
- (b) the will had been executed by him in the manner required by the 1837 Act.

(4) Sub-paragraph (3) does not have effect in relation to the will –

- (a) in so far as it disposes of immovable property outside England and Wales, or
- (b) in so far as it relates to any other property or matter if, when the will is executed –

- (i) P is domiciled outside England and Wales, and
- (ii) the condition in sub-paragraph (5) is met.

(5) The condition is that, under the law of P's domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of a place outside England and Wales.

*Vesting orders ancillary to settlement etc.*

5 (1) If provision is made by virtue of section 18 for –

- (a) the settlement of any property of P, or

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(b) the exercise of a power vested in him of appointing trustees or retiring from a trust,

the court may also make as respects the property settled or the trust property such consequential vesting or other orders as the case may require.

(2) The power under sub-paragraph (1) includes, in the case of the exercise of such a power, any order which could have been made in such a case under Part 4 of the Trustee Act 1925 (c. 19). 5

*Variation of settlements*

6 (1) If a settlement has been made by virtue of section 18, the court may by order vary or revoke the settlement if – 10

- (a) the settlement makes provision for its variation or revocation,
- (b) the court is satisfied that a material fact was not disclosed when the settlement was made, or
- (c) the court is satisfied that there has been a substantial change of circumstances.

(2) Any such order may give such consequential directions as the court thinks fit. 15

*Vesting of stock in curator appointed outside England and Wales*

7 (1) Sub-paragraph (2) applies if the court is satisfied – 20

- (a) that under the law prevailing in a place outside England and Wales a person (“M”) has been appointed to exercise powers in respect of the property or affairs of P on the ground (however formulated) that P lacks capacity to make decisions with respect to the management and administration of his property and affairs, and
- (b) that, having regard to the nature of the appointment and to the circumstances of the case, it is expedient that the court should exercise its powers under this paragraph. 25

(2) The court may direct –

- (a) any stocks standing in the name of P, or
- (b) the right to receive dividends from the stocks, 30

to be transferred into M’s name or otherwise dealt with as required by M, and may give such directions as the court thinks fit for dealing with accrued dividends from the stocks.

(3) “Stocks” includes – 35

- (a) shares, and
- (b) any funds, annuity or security transferable in the books kept by any body corporate or unincorporated company or society or by an instrument of transfer either alone or accompanied by other formalities,

and “dividends” is to be construed accordingly. 40

*Preservation of interests in property disposed of on behalf of person lacking capacity*

8 (1) Sub-paragraphs (2) and (3) apply if –

- (a) P’s property has been disposed of by virtue of section 18,

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- (b) under P's will or intestacy, or by a gift perfected or nomination taking effect on his death, any other person would have taken an interest in the property but for the disposal, and
- (c) on P's death, any property belonging to P's estate represents the property disposed of.

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- (2) The person takes the same interest, if and so far as circumstances allow, in the property representing the property disposed of.
- (3) If the property disposed of was real property, any property representing it is to be treated, so long as it remains part of P's estate, as if it were real property.
- (4) The court may direct that, on a disposal of P's property –
  - (a) which is made by virtue of section 18, and
  - (b) which would apart from this paragraph result in the conversion of personal property into real property,
 property representing the property disposed of is to be treated, so long as it remains P's property or forms part of P's estate, as if it were personal property.

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- (5) References in sub-paragraphs (1) to (4) to the disposal of property are to –
  - (a) the sale, exchange, charging of or other dealing (otherwise than by will) with property other than money;
  - (b) the removal of property from one place to another;
  - (c) the application of money in acquiring property;
  - (d) the transfer of money from one account to another;
 and references to property representing property disposed of are to be construed accordingly and as including the result of successive disposals.

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- (6) The court may give such directions as appear to it necessary or expedient for the purpose of facilitating the operation of sub-paragraphs (1) to (3), including the carrying of money to a separate account and the transfer of property other than money.

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9 (1) Sub-paragraph (2) applies if the court has ordered or directed the expenditure of money –
 

- (a) for carrying out permanent improvements on any of P's property, or
- (b) otherwise for the permanent benefit of any of P's property.

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(2) The court may order that –
 

- (a) the whole of the money expended or to be expended, or
- (b) any part of it,

 is to be a charge on the property either without interest or with interest at a specified rate.

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(3) An order under sub-paragraph (2) may provide for excluding or restricting the operation of paragraph 8(1) to (3).

(4) A charge under sub-paragraph (2) may be made in favour of such person as may be just and, in particular, where the money charged is paid out of P's general estate, may be made in favour of a person as trustee for P.

(5) No charge under sub-paragraph (2) may confer any right of sale or foreclosure during P's lifetime.

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*Powers as patron of benefice*

10 Only the Lord Chancellor has power to exercise, on behalf of P, P's powers as patron of a benefice.

SCHEDULE 3

Section 52(3)

PROVISIONS APPLYING TO EXISTING ENDURING POWERS OF ATTORNEY

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PART 1

ENDURING POWERS OF ATTORNEY

*Enduring power of attorney to survive mental incapacity of donor*

1 (1) Where an individual has created a power of attorney which is an enduring power within the meaning of this Schedule –

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(a) the power is not revoked by any subsequent mental incapacity of his,  
(b) upon such incapacity supervening the donee of the power may not do anything under the authority of the power except as provided by sub-paragraph (2) unless or, as the case may be, until the instrument creating the power is registered under paragraph 5, and  
(c) if and so long as paragraph (b) operates to suspend the donee's authority to act under the power, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection of donee and third persons), so far as applicable, applies as if the power had been revoked by the donor's mental incapacity.

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(2) Despite sub-paragraph (1)(b), where the attorney has made an application for registration of the instrument then, until it is registered, the attorney may take action under the power –

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(a) to maintain the donor or prevent loss to his estate, or  
(b) to maintain himself or other persons in so far as paragraph 3(3) permits him to do so.

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(3) Where the attorney purports to act as provided by sub-paragraph (2) then, in favour of a person who deals with him without knowledge that the attorney is acting otherwise than in accordance with sub-paragraph (2)(a) or (b), the transaction between them is as valid as if the attorney were acting in accordance with sub-paragraph (2)(a) or (b).

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*Characteristics of an enduring power of attorney*

2 (1) Subject to sub-paragraphs (5) and (6) and paragraph 19, a power of attorney is an enduring power within the meaning of this Schedule if the instrument which creates the power –

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(a) is in the prescribed form,  
(b) was executed in the prescribed manner by the donor and the attorney, and  
(c) incorporated at the time of execution by the donor the prescribed explanatory information.

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(2) In this paragraph “prescribed” means prescribed by such of the following regulations as applied when the instrument was executed –

- (a) the Enduring Powers of Attorney (Prescribed Form) Regulations 1986 (S.I. 1986/126);
- (b) the Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (S.I. 1987/1612);
- (c) the Enduring Powers of Attorney (Prescribed Form) Regulations 1990 (S.I. 1990/1376);
- (d) the Enduring Powers of Attorney (Welsh Language Prescribed Form) Regulations 2000 (S.I. 2000/289).

(3) An instrument in the prescribed form purporting to have been executed in the prescribed manner is to be taken, in the absence of evidence to the contrary, to be a document which incorporated at the time of execution by the donor the prescribed explanatory information.

(4) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form it is to be treated as sufficient in point of form and expression.

(5) A power of attorney cannot be an enduring power unless, when he executes the instrument creating it, the attorney is –

- (a) an individual who has reached 18 and is not bankrupt, or
- (b) a trust corporation.

(6) A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power.

(7) An enduring power is revoked by the bankruptcy of the attorney whatever the circumstances of the bankruptcy.

(8) No disclaimer of an enduring power, whether by deed or otherwise, is valid unless and until the attorney gives notice of it to the donor or, where paragraph 4(6) or 14(1) applies, to the Public Guardian.

*Scope of authority etc. of attorney under enduring power*

3 (1) An enduring power –

- (a) may confer general authority (as defined in sub-paragraph (2)) on the attorney to act on the donor’s behalf in relation to all or a specified part of the property and affairs of the donor, or
- (b) may confer on him authority to do specified things on the donor’s behalf;

and the authority may, in either case, be conferred subject to conditions and restrictions.

(2) If an instrument is expressed to confer general authority on the attorney it operates to confer, subject to –

- (a) the restriction imposed by sub-paragraph (4), and
- (b) any conditions or restrictions contained in the instrument,

authority to do on behalf of the donor anything which the donor can lawfully do by an attorney.

(3) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further –

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(a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively, and

(b) he may do whatever the donor might be expected to do to meet those needs.

(4) Without prejudice to sub-paragraph (3) but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further –

(a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth or marriage, to persons (including himself) who are related to or connected with the donor, and

(b) he may make gifts to any charity to whom the donor made or might be expected to make gifts,

provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

## PART 2

### ACTION ON ACTUAL OR IMPENDING INCAPACITY OF DONOR

#### *Duties of attorney in event of actual or impending incapacity of donor*

4 (1) Sub-paragraphs (2) to (6) apply if the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable.

(2) The attorney must, as soon as practicable, make an application to the Public Guardian for the registration of the instrument creating the power.

(3) Before making an application for registration the attorney must comply with the provisions as to notice set out in Part 3 of this Schedule.

(4) An application for registration –

(a) must be made in the prescribed form, and

(b) must contain such statements as may be prescribed.

(5) The attorney –

(a) may, before making an application for the registration of the instrument, refer to the court for its determination any question as to the validity of the power, and

(b) must comply with any direction given to him by the court on that determination.

(6) No disclaimer of the power is valid unless and until the attorney gives notice of it to the Public Guardian; and the Public Guardian must notify the donor if he receives a notice under this sub-paragraph.

(7) Any person who, in an application for registration, makes a statement which he knows to be false in a material particular is liable –

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine, or both.

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(8) In this paragraph “prescribed” means prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor.

*Registration of instrument creating power*

5 (1) If an application is made in accordance with paragraph 4(3) and (4) the Public Guardian must, subject to the provisions of this paragraph, register the instrument to which the application relates.

(2) The court may, on the application of the attorney, direct the Public Guardian to register an instrument even though notice has not been given as required by paragraph 4(3) and Part 3 of this Schedule to a person entitled to receive it, if the court is satisfied –

(a) that it was undesirable or impracticable for the attorney to give notice to that person, or  
(b) that no useful purpose is likely to be served by giving him notice.

(3) Any person entitled by virtue of paragraph 6 to receive notice of an application for the registration of an instrument may, by notice in writing before the end of the period of 4 weeks beginning with the day on which the notice under Part 3 of this Schedule was given to him, object to the registration by applying to the court for an order directing the Public Guardian not to register the application.

(4) If, in the case of an application for registration, a valid notice of objection to the registration of the instrument to which the application relates is received by the court before the end of the period of 5 weeks beginning with the date or, as the case may be, latest date on which the attorney gave notice to any person under Part 3 of this Schedule –

(a) the court must inform the Public Guardian of that fact, and  
(b) the Public Guardian must not register the instrument except in accordance with the court’s directions.

(5) Any objection under sub-paragraph (3) is valid if made on one or more of the following grounds –

(a) that the power purported to have been created by the instrument was not valid as an enduring power of attorney;  
(b) that the power created by the instrument no longer subsists;  
(c) that the application is premature because the donor is not yet becoming mentally incapable;  
(d) that fraud or undue pressure was used to induce the donor to create the power;  
(e) that, having regard to all the circumstances and in particular the attorney’s relationship to or connection with the donor, the attorney is unsuitable to be the donor’s attorney.

(6) If any of those grounds is established to the satisfaction of the court it must direct the Public Guardian not to register the instrument, but if not so satisfied it must direct its registration.

(7) If the court directs the Public Guardian not to register an instrument because it is satisfied that the ground in sub-paragraph (5)(d) or (e) is established, it must by order revoke the power created by the instrument.

(8) If the court directs the Public Guardian not to register an instrument because it is satisfied that any ground in sub-paragraph (5) except that in sub-

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paragraph (5)(c) is established, the instrument must be delivered up to be cancelled unless the court otherwise directs.

## PART 3

### NOTIFICATION PRIOR TO REGISTRATION

#### Duty to give notice to relatives

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6 Subject to paragraph 8, before making an application for registration the attorney must give notice of his intention to do so to all those persons (if any) who are entitled to receive notice by virtue of paragraph 7.

7 (1) Subject to sub-paragraphs (2) to (4), persons of the following classes (“relatives”) are entitled to receive notice under paragraph 6 –

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- (a) the donor’s husband or wife,
- (b) the donor’s children,
- (c) the donor’s parents,
- (d) the donor’s brothers and sisters, whether of the whole or half blood,
- (e) the widow or widower of a child of the donor,
- (f) the donor’s grandchildren,
- (g) the children of the donor’s brothers and sisters of the whole blood,
- (h) the children of the donor’s brothers and sisters of the half blood,
- (i) the donor’s uncles and aunts of the whole blood, and
- (j) the children of the donor’s uncles and aunts of the whole blood.

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(2) A person is not entitled to receive notice under paragraph 6 if –

- (a) his name or address is not known to the attorney and cannot be reasonably ascertained by him, or
- (b) the attorney has reason to believe that he has not reached 18 or is mentally incapable.

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(3) Except where sub-paragraph (4) applies –

- (a) no more than 3 persons are entitled to receive notice under paragraph 6, and
- (b) in determining the persons who are so entitled, persons falling within the class in sub-paragraph (1)(a) are to be preferred to persons falling within the class in sub-paragraph (1)(b), those falling within the class in sub-paragraph (1)(b) are to be preferred to those falling within the class in sub-paragraph (1)(c), and so on.

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(4) Despite the limit of 3 specified in sub-paragraph (3), where –

- (a) there is more than one person falling within any of classes (a) to (j) of sub-paragraph (1), and
- (b) at least one of those persons would be entitled to receive notice under paragraph 6,

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then, subject to sub-paragraph (2), all the persons falling within that class are entitled to receive notice under paragraph 6.

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8 (1) An attorney is not required to give notice under paragraph 6 –

- (a) to himself, or
- (b) to any other attorney under the power who is joining in making the application,

even though he or, as the case may be, the other attorney is entitled to receive notice by virtue of paragraph 7.

(2) In the case of any person who is entitled to receive notice under paragraph 6, the attorney, before applying for registration, may make an application to the court to be dispensed from the requirement to give him notice; and the court must grant the application if it is satisfied –

- (a) that it would be undesirable or impracticable for the attorney to give him notice, or
- (b) that no useful purpose is likely to be served by giving him notice.

*Duty to give notice to donor*

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9 (1) Subject to sub-paragraph (2), before making an application for registration the attorney must give notice of his intention to do so to the donor.

(2) Paragraph 8(2) applies in relation to the donor as it applies in relation to a person who is entitled to receive notice under paragraph 6.

*Contents of notices*

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10 A notice to relatives under this Part of this Schedule –

- (a) must be in the form prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor;
- (b) must state that the attorney proposes to make an application to the Public Guardian for the registration of the instrument creating the enduring power in question;
- (c) must inform the person to whom it is given of his right to object to the registration under paragraph 5(3).

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11 A notice to the donor under this Part of this Schedule –

- (a) must be in the form prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor;
- (b) must contain the statement mentioned in paragraph 10(b), and
- (c) must inform the donor that, whilst the instrument remains registered, any revocation of the power by him will be ineffective unless and until the revocation is confirmed by the court.

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*Duty to give notice to other attorneys*

12 (1) Subject to sub-paragraph (2), before making an application for registration an attorney under a joint and several power must give notice of his intention to do so to any other attorney under the power who is not joining in making the application; and paragraphs 8(2) and 10 apply in relation to attorneys entitled to receive notice by virtue of this paragraph as they apply in relation to persons entitled to receive notice by virtue of paragraph 7.

(2) An attorney is not entitled to receive notice by virtue of this paragraph if –

- (a) his address is not known to the applying attorney and cannot reasonably be ascertained by him, or
- (b) the applying attorney has reason to believe that he has not reached 18 or is mentally incapable.

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*Supplementary*

13 Notwithstanding section 7 of the Interpretation Act 1978 (c. 30) (construction of references to service by post), for the purposes of this Part of this Schedule a notice given by post is to be regarded as given on the date on which it was posted. 5

**PART 4**

**LEGAL POSITION AFTER REGISTRATION**

*Effect and proof of registration*

14 (1) The effect of the registration of an instrument under paragraph 5 is that –  
(a) no revocation of the power by the donor is valid unless and until the court confirms the revocation under paragraph 15(3);  
(b) no disclaimer of the power is valid unless and until the attorney gives notice of it to the Public Guardian;  
(c) the donor may not extend or restrict the scope of the authority conferred by the instrument and no instruction or consent given by him after registration, in the case of a consent, confers any right and, in the case of an instruction, imposes or confers any obligation or right on or creates any liability of the attorney or other persons having notice of the instruction or consent. 10  
(2) Sub-paragraph (1) applies for so long as the instrument is registered under paragraph 5 whether or not the donor is for the time being mentally incapable. 20  
(3) A document purporting to be an office copy of an instrument registered under this Schedule is, in any part of the United Kingdom, evidence of –  
(a) the contents of the instrument, and  
(b) the fact that it has been so registered. 25  
(4) Sub-paragraph (3) is without prejudice to section 3 of the Powers of Attorney Act 1971 (c. 27) (proof by certified copies) and to any other method of proof authorised by law. 30

*Functions of court with regard to registered power*

15 (1) Where an instrument has been registered under paragraph 5, the court has the following functions with respect to the power and the donor of and the attorney appointed to act under the power.  
(2) The court may –  
(a) determine any question as to the meaning or effect of the instrument;  
(b) give directions with respect to –  
(i) the management or disposal by the attorney of the property and affairs of the donor;  
(ii) the rendering of accounts by the attorney and the production of the records kept by him for the purpose;  
(iii) the remuneration or expenses of the attorney whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive or the payment of additional remuneration; 35  
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- (c) require the attorney to supply information or produce documents or things in his possession as attorney;
- (d) give any consent or authorisation to act which the attorney would have to obtain from a mentally capable donor;
- (e) authorise the attorney to act so as to benefit himself or other persons than the donor otherwise than in accordance with paragraph 3(3) and (4) (but subject to any conditions or restrictions contained in the instrument);
- (f) relieve the attorney wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as attorney.

(3) On application made for the purpose by or on behalf of the donor, the court must confirm the revocation of the power if satisfied that the donor –

- (a) has done whatever is necessary in law to effect an express revocation of the power, and
- (b) was mentally capable of revoking a power of attorney when he did so (whether or not he is so when the court considers the application).

(4) The court must direct the Public Guardian to cancel the registration of an instrument registered under paragraph 5 in any of the following circumstances –

- (a) on confirming the revocation of the power under sub-paragraph (3);
- (b) on being satisfied that the donor is and is likely to remain mentally capable;
- (c) on being satisfied that the power has expired or has been revoked by the mental incapacity of the attorney;
- (d) on being satisfied that the power was not a valid and subsisting enduring power when registration was effected;
- (e) on being satisfied that fraud or undue pressure was used to induce the donor to create the power; or
- (f) on being satisfied that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney.

(5) If the court directs the Public Guardian to cancel the registration of an instrument on being satisfied of the matters specified in sub-paragraph (4)(e) or (f) it must by order revoke the power created by the instrument.

(6) If the court directs the cancellation of the registration of an instrument under sub-paragraph (4) except paragraph (b) the instrument must be delivered up to the Public Guardian to be cancelled, unless the court otherwise directs.

*Cancellation of registration by Public Guardian*

16 The Public Guardian must cancel the registration of an instrument creating an enduring power of attorney –

- (a) on receipt of a disclaimer signed by the attorney;
- (b) if satisfied that the power has been revoked by the death or bankruptcy of the donor or attorney or, if the attorney is a body corporate, by its winding up or dissolution;
- (c) on receipt of notification from the court that the court has revoked the power;
- (d) on confirmation from the court that the donor has revoked the power.

## PART 5

## PROTECTION OF ATTORNEY AND THIRD PARTIES

*Protection of attorney and third persons where power is invalid or revoked*

17 (1) Sub-paragraphs (2) and (3) apply where an instrument which did not create a valid power of attorney has been registered under paragraph 5 (whether or not the registration has been cancelled at the time of the act or transaction in question). 5

(2) An attorney who acts in pursuance of the power does not incur any liability (either to the donor or to any other person) because of the non-existence of the power unless at the time of acting he knows – 10

- (a) that the instrument did not create a valid enduring power,
- (b) that an event has occurred which, if the instrument had created a valid enduring power, would have had the effect of revoking the power, or
- (c) that, if the instrument had created a valid enduring power, the power would have expired before that time. 15

(3) Any transaction between the attorney and another person is, in favour of that person, as valid as if the power had then been in existence, unless at the time of the transaction that person has knowledge of any of the matters mentioned in sub-paragraph (2). 20

(4) If the interest of a purchaser depends on whether a transaction between the attorney and another person was valid by virtue of sub-paragraph (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if – 25

- (a) the transaction between that person and the attorney was completed within 12 months of the date on which the instrument was registered, or
- (b) that person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the attorney had authority to dispose of the property which was the subject of the transaction. 30

(5) For the purposes of section 5 of the Powers of Attorney Act 1971 (c. 27) (protection where power is revoked) in its application to an enduring power the revocation of which by the donor is by virtue of paragraph 14 invalid unless and until confirmed by the court under paragraph 15 – 35

- (a) knowledge of the confirmation of the revocation is, but
- (b) knowledge of the unconfirmed revocation is not, knowledge of the revocation of the power.

*Further protection of attorney and third persons*

18 (1) If – 40

- (a) an instrument framed in a form prescribed as mentioned in paragraph 2(2) creates a power which is not a valid enduring power, and
- (b) the power is revoked by the mental incapacity of the donor, sub-paragraphs (2) and (3) apply, whether or not the instrument has been registered. 45

(2) An attorney who acts in pursuance of the power does not, by reason of the revocation, incur any liability (either to the donor or to any other person) unless at the time of acting he knows—

- (a) that the instrument did not create a valid enduring power, and
- (b) that the donor has become mentally incapable.

(3) Any transaction between the attorney and another person is, in favour of that person, as valid as if the power had then been in existence, unless at the time of the transaction that person knows—

- (a) that the instrument did not create a valid enduring power, and
- (b) that the donor has become mentally incapable.

(4) Paragraph 17(4) applies for the purpose of determining whether a transaction was valid by virtue of sub-paragraph (3) as it applies for the purpose of determining whether a transaction was valid by virtue of paragraph 17(3).

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## PART 6

### JOINT AND JOINT AND SEVERAL ATTORNEYS

#### *Application to joint and joint and several attorneys*

19 (1) An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act—

- (a) jointly, or
- (b) jointly and severally.

(2) This Schedule, in its application to joint attorneys, applies to them collectively as it applies to a single attorney but subject to the modifications specified in paragraph 20.

(3) This Schedule, in its application to joint and several attorneys, applies with the modifications specified in sub-paragraphs (4) to (7) and in paragraph 21.

(4) A failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers—

- (a) prevents the instrument from creating such a power in his case, but
- (b) does not affect its efficacy for that purpose as respects the other or others or its efficacy in his case for the purpose of creating a power of attorney which is not an enduring power.

(5) If one or more but not both or all the attorneys makes or joins in making an application for registration of the instrument—

- (a) an attorney who is not an applicant as well as one who is may act pending the registration of the instrument as provided in paragraph 1(2),
- (b) notice of the application must also be given under Part 3 of this Schedule to the other attorney or attorneys, and
- (c) objection may validly be taken to the registration on a ground relating to an attorney or to the power of an attorney who is not an applicant as well as to one or the power of one who is an applicant.

(6) The Public Guardian is not precluded by paragraph 5(4) from registering an instrument and the court must not direct him not to do so under paragraph

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5(6) if an enduring power subsists as respects some attorney who is not affected by the ground or grounds of the objection in question.

(7) Sub-paragraph (6) does not preclude the court from revoking a power in so far as it confers a power on any other attorney in respect of whom the ground in paragraph 5(5)(d) or (e) is established; and where any ground in paragraph 5(5) affecting any other attorney is established the court must direct the Public Guardian to make against the registration an entry in such form as may be prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor.

(8) In sub-paragraph (4) “the requirements for the creation of enduring powers” means the provisions of –

- (a) paragraph 2 other than sub-paragraphs (7) and (8), and
- (b) the regulations mentioned in paragraph 2.

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*Joint attorneys*

20 (1) In paragraph 2(5), the reference to the time when the attorney executes the instrument is to be read as a reference to the time when the second or last attorney executes the instrument.

(2) In paragraph 2(6) and (7), the reference to the attorney is to be read as a reference to any attorney under the power.

(3) Paragraph 5 has effect as if the ground of objection to the registration of the instrument specified in sub-paragraph (5)(e) applied to any attorney under the power.

(4) In paragraph 15(2), references to the attorney are to be read as including references to any attorney under the power.

(5) In paragraph 15(4), references to the attorney are to be read as including references to any attorney under the power.

(6) In paragraph 16, references to the attorney are to be read as including references to any attorney under the power.

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*Joint and several attorneys*

21 (1) In paragraph 2(7), the reference to the bankruptcy of the attorney is to be read as a reference to the bankruptcy of the last remaining attorney under the power; and the bankruptcy of any other attorney under the power causes that person to cease to be attorney, whatever the circumstances of the bankruptcy.

(2) The restriction upon disclaimer imposed by paragraph 4(6) applies only to those attorneys who have reason to believe that the donor is or is becoming mentally incapable.

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## PART 7

## INTERPRETATION

22 (1) In this Schedule –

“enduring power” is to be construed in accordance with paragraph 2; “mentally incapable” or “mental incapacity”, except where it refers to revocation at common law, means in relation to any person, that he

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is incapable by reason of mental disorder of managing and administering his property and affairs and “mentally capable” and “mental capacity” are to be construed accordingly;  
“notice” means notice in writing.

(2) Any question arising under or for the purposes of this Schedule as to what the donor of the power might at any time be expected to do is to be determined by assuming that he had full mental capacity at the time but otherwise by reference to the circumstances existing at that time. 5

## SCHEDULE 4

Section 52(4)

### TRANSITIONAL PROVISIONS AND SAVINGS

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#### PART 1

##### REPEAL OF PART 7 OF THE MENTAL HEALTH ACT 1983

###### *Existing receivers*

1 (1) Where immediately before the commencement day there is in the case of any person a receiver appointed for him under section 99 of the Mental Health Act – 15

- (a) the Public Trustee is to be treated as if he were a deputy appointed under section 16 for that person with powers as respects the matters specified in section 18(1)(a) to (g) and (k); and
- (b) the person who is the receiver immediately before that day is to continue as such on and after that day with his existing functions but must act in accordance with any directions or authority given to him by the Public Trustee in his capacity as deputy. 20

(2) The court may terminate the functions exercisable by a person as receiver by virtue of sub-paragraph (1)(b). 25

(3) In sub-paragraph (1) the reference to a receiver appointed under section 99 of the Mental Health Act includes a reference to a person who by virtue of Schedule 5 to that Act was deemed to be a receiver appointed under that section.

###### *Orders, appointments etc.*

2 (1) Any order or appointment made, direction or authority given or other thing done which has, or by virtue of Schedule 5 to the Mental Health Act was deemed to have, effect under Part 7 of the Act immediately before the commencement day is to continue to have effect despite the repeal of Part 7. 30

(2) In so far as any such order, appointment, direction, authority or thing could have been made, given or done under sections 16 to 20 if those sections had then been in force – 35

- (a) it is to be treated as made, given or done under those sections, and
- (b) the powers of variation and discharge conferred by section 16(7) apply accordingly.

(3) Sub-paragraph (1) – 40

- (a) does not apply to nominations under section 93(1) or (4) of the Mental Health Act, and
- (b) as respects receivers, has effect subject to paragraph 1.

(4) This Act does not affect the operation of section 109 of the Mental Health Act (effect and proof of orders etc.) in relation to orders made and directions given under Part 7 of that Act. 5

(5) This paragraph is without prejudice to section 16 of the Interpretation Act 1978 (c. 30) (general savings on repeal).

#### Pending proceedings

3 (1) Any application for the exercise of a power under Part 7 of the Mental Health Act which is pending immediately before this Act comes into force is to be treated, in so far as a corresponding power is exercisable under sections 16 to 20, as an application for the exercise of that power. 10

(2) For the purposes of sub-paragraph (1) an application for the appointment of a receiver is to be treated as an application for the appointment of a deputy. 15

#### Appeals

4 (1) Part 7 of the Mental Health Act and the rules made under it are to continue to apply to any appeal brought by virtue of section 105 of that Act which has not been determined before the commencement day. 20

(2) If in the case of an appeal brought by virtue of section 105(1) (appeal to nominated judge) the judge nominated under section 93 of the Mental Health Act has begun to hear the appeal, he is to continue to do so but otherwise it is to be heard by a puisne judge of the High Court nominated under section 35.

#### Funds in court

5 All investments and money which, immediately before the commencement day, constituted the funds in court of the former Court of Protection are, by virtue of this paragraph, and without any transfer or assignment, vested in the Accountant General of the Supreme Court as funds of the new Court of Protection. 30

#### Fees

6 All fees and other payments which, having become due, have not been paid to the former Court of Protection before the commencement day, are to be paid to the Public Trustee who is to pay such part of them to the new Court of Protection as the Lord Chancellor may with the consent of the Treasury direct. 35

#### Court records

7 All records of the former Court of Protection are to be treated, after the commencement day, as records of the new Court of Protection and are to be dealt with accordingly under the Public Records Act 1958 (c. 51). 40

*Existing charges*

8 This Act does not affect the operation in relation to a charge created before the commencement day of—

- (a) so much of section 101(6) of the Mental Health Act as precludes a charge created under section 101(5) from conferring a right of sale or foreclosure during the lifetime of the patient; or
- (b) section 106(6) of the Mental Health Act (charge created by virtue of section 106(5) not to cause interest to fail etc.).

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*Preservation of interests on disposal of property*

9 Paragraph 5(1) of Schedule 2 applies in relation to any disposal of property (within the meaning of that provision) by a person living on 1st November 1960, being a disposal effected under the Lunacy Act 1890 (c. 5) as it applies in relation to the disposal of property effected under sections 16 to 20.

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*Interpretation*

10 In this Part of this Schedule—

- (a) “the commencement day” means the day on which section 52(1)(a) (repeal of Part 7 of the Mental Health Act) comes into force;
- (b) “the former Court of Protection” means the office abolished by section 34;
- (c) “the new Court of Protection” means the court established by section 34.

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**PART 2**

**REPEAL OF THE ENDURING POWERS OF ATTORNEY ACT 1985**

*Orders, determinations, etc.*

11 (1) Any order or determination made or other thing done under the 1985 Act which has effect immediately before the commencement day shall continue to have effect despite the repeal of that Act.

(2) In so far as any such order, determination or thing could have been made or done under Schedule 3 if it had then been in force—

- (a) it is to be treated as made or done under that Schedule, and
- (b) the powers of variation and discharge exercisable by the court apply accordingly.

(3) Any instrument registered under the 1985 Act is to be treated as having been registered by the Public Guardian under Schedule 3.

(4) This paragraph is without prejudice to section 16 of the Interpretation Act 1978 (c. 30) (general savings on repeal).

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*Pending proceedings*

12 (1) Any application for the exercise of a power under the 1985 Act which is pending immediately before the commencement day is to be treated, in so far as a corresponding power is exercisable under Schedule 3, as an application for the exercise of that power.

## (2) For the purposes of sub-paragraph (1) –

- (a) a pending application under section 4(2) of the 1985 Act for the registration of an instrument is to be treated as an application to the Public Guardian under paragraph 4 of Schedule 3 and any notice given in connection with that application under Schedule 1 to the 1985 Act is to be treated as given under Part 3 of Schedule 3; 5
- (b) a notice of objection to the registration of an instrument is to be treated as an application to the court under paragraph 5(3) of Schedule 3;
- (c) pending proceedings under section 5 of the 1985 Act are to be treated as proceedings on an application for the exercise by the court of a power under paragraph 15(2) of that Schedule. 10

*Appeals*

13 (1) The 1985 Act, and, so far as relevant, the provisions of Part 7 of the Mental Health Act and the rules made under it as applied by section 10 of the 1985 Act, are to continue to have effect in relation to any appeal brought by virtue of section 10(1)(c) of the 1985 Act which has not been determined before the commencement day. 15

(2) If in the case of an appeal brought by virtue of section 105(1) of the Mental Health Act as applied by section 10(1)(c) of the 1985 Act (appeal to nominated judge) the judge nominated under section 93 of the Mental Health Act has begun to hear the appeal, he is to continue to do so but otherwise the appeal is to be heard by a puisne judge of the High Court nominated under section 34. 20

*Interpretation*

14 In this Part of this Schedule “the commencement day” means the day on which section 52(1)(b) (repeal of the 1985 Act) comes into force. 25











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